

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

PASTA MONTANA, LLC,

Employer

and

Case 19--RC--14448

UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 8, AFL-CIO, CLC

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>1</sup> in this proceeding, the undersigned finds:<sup>2</sup>

**SUMMARY**

The Employer is engaged in the business of processing and manufacturing pasta products for sale to manufacturers and retail businesses at its facility in Great Falls, Montana (Facility"). On September 5, 2003, the Petitioner filed the instant petition seeking a unit of all hourly paid employees of the Employer employed in packaging, processing, maintenance, sanitation, quality control and warehouse, excluding all managers, professional staff, technical staff, officers, directors, partners, salaried employees, temporary employees, guards and supervisors as defined by the Act. The Employer contends that a senior processor, Kay Vercolen, is a supervisor as that term is defined by Section 2(11) of the Act and, therefore, should be excluded from the unit of employees sought by Petitioner. The Petitioner contends that Vercolen is not a supervisor and, thus, should be included in the unit.<sup>3</sup>

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<sup>1</sup> A brief was timely received from the Employer and was duly considered. The Petitioner did not submit a brief.

<sup>2</sup> The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein; the labor organization, herein involved, claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> During the representation hearing in this matter on September 17, 2003, the Petitioner and the Employer stipulated that the packaging leads, Jackie Dyson, Terry Filer, Adam Hatch, and Floyd Zuern are statutory supervisors pursuant to Section 2(11) of the Act because they responsibly direct employees, assign work to employees, and issue discipline to employees. Accordingly, these individuals are excluded from the Unit.

Based on the following facts and legal analysis as well as the record as a whole, I find, in agreement with the Employer, that Vercolen is a statutory supervisor within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude Vercolen from the unit.

Below, I have set forth a section setting forth the facts, as revealed by the record in this matter, and relating to background information about the Employer's operations and relating to the duties and responsibilities of Kay Vercolen. Following the Fact section is a section dealing with my analysis of the applicable legal standards in this case and a section setting forth the direction of election.

## **1. FACTS**

### **A. Background**

Kay Vercolen is the senior processor in the Employer's manufacturing or processing department. The processing department consists of three full-time processors, four full-time processing assistants and a number of temporary employees.<sup>4</sup> Express Personnel, a temporary agency, employs the temporary employees. Rebecca Thompson, processing engineer, manages the processing department. Vercolen reports to Thompson, who, in turn, reports directly to Plant Manager David Richardson.<sup>5</sup> All employees in the processing department, including Vercolen, are hourly employees.<sup>6</sup> In terms of pay, Vercolen earns \$1.00 per hour more than the highest paid processor.

The Employer's Facility operates 24 hours a day, seven days per week. The processing department employees work three shifts: 7:00 a.m. to 3:30 p.m., 3:00 p.m. to 11:30 p.m., and 11:00 p.m. to 7:30 a.m. There are at least two employees working in the processing department on each shift. The employees in the processing department produce the Employer's dry pasta products from various ingredients. After the pasta is produced, it leaves the processing department and proceeds to the Employer's packaging department where it is packaged. The packaged product then proceeds to the warehouse department where it is stored and/or shipped to customers.

### **B. Kay Vercolen's Duties and Responsibilities**

#### **1.) Overview of Vercolen's Production Floor Responsibilities**

Vercolen's lead processor position was created in 1999, in order to provide support for Thompson and to provide supervision for the processing department. Indeed, Thompson informs all production department employees that Vercolen is their supervisor. Thompson testified that Vercolen's primary job responsibility is to provide oversight for the successful completion of the manufacturing portion of the production schedule in the processing

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<sup>4</sup> The Employer did not present evidence with regard to the number of temporary employees utilized by the Employer in the processing department.

<sup>5</sup> I note that while Thompson testified that she reports to Dave Richardson, whom she identified as the Plant Manager, the Employer's February 2003 organizational chart identifies Richardson as the Assistant Plant Manager and Y. Takai as the Plant Manager. The testimony indicated that there was a reorganization of the company in September 2003. The September 2003 organizational chart lists John Whalen as the Plant Manager. Richardson and Takai are not listed on the Employer's 2003 organizational chart.

<sup>6</sup> Thompson receives a salary as opposed to an hourly rate.

department. To achieve this end, Vercolen spends approximately six hours out of an eight-hour day on the production floor, in contrast to the two hours per day typically spent on the production floor by Thompson.<sup>7</sup>

While on the production floor, Vercolen ensures the processing equipment is being properly maintained and moves production assistants to other production lines based upon equipment problems and type of product being produced. Thompson, the sole witness to testify at the hearing in this case, did not elaborate on the number of production lines and the differences, if any, in the lines. In any event, Thompson testified that Vercolen moves employees between lines based upon her assessment of the number of employees it takes to perform a certain job.

Thompson testified that, often during the production process, a piece of equipment, called a "stick," would break. Vercolen's job is to assess the broken equipment and to decide whether to assign employees to immediately repair the stick or to continue on with their work due to the pressing needs of production. However, Thompson did not elaborate on the significance of the stick to the equipment and/or to the production process.

Vercolen is also responsible for assigning employees to clean general areas in the processing department based upon her observations and production needs. While there are general Facility guidelines for the periodic cleaning of the equipment, there is no similar schedule for cleaning other department areas that fall within Vercolen's charge. With respect to cleaning, Thompson testified regarding a number of instances where Vercolen directed processing department employees on the correct manner in which the employees are to clean certain equipment. Vercolen must also direct employees to properly clean out old dough after switching die casts, which is a task processing employees occasionally forget to perform or fail to perform correctly.

Additionally, Vercolen ensures that employees are properly recording product moisture levels at regular intervals in the production process and that the moisture levels are within specific ranges. Vercolen coordinates and assists in accomplishing die changes.<sup>8</sup> Vercolen, on an hourly basis, in conjunction with Thompson, and the quality control manager, inspects product samples, and conducts testing of samples. Vercolen and Thompson are also the only individuals in the plant who have access to make air handling system adjustments. These adjustments are necessary to ensure the proper temperature and humidity for the production of pasta in the processing department.

Thompson testified that Vercolen does not consult with Thompson in connection with Vercolen's day-to-day oversight of employees in the processing department.

Vercolen conducts training of the processing department employees. However, when Vercolen is unavailable, the experienced processors conduct on-the-job training of processing assistants. When Vercolen conducts the training, she will take new employees through the plant and show them the entire production process. She also reviews job duties with them, shows them how to test the product's moisture level, and trains new employees on die cast changes. Vercolen also trained employees when the Employer received a new piece of equipment, a diverter, for which Vercolen wrote the operation procedure.

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<sup>7</sup> Thompson indicated that she is in charge of the technical aspect of the processing department while Vercolen is in charge of the day-to-day operation in the same department.

<sup>8</sup> Dies are a type of mold for the pasta that affects the shape and size of the pasta produced.

Vercolen also works on the production floor as a processor and/or processing assistant when she substitutes for sick or vacationing employees, as does Thompson. Vercolen additionally substitutes for Thompson when the latter is on vacation, which is for a maximum of 3 weeks out of each year. When Vercolen substitutes for Thompson, Vercolen does not perform certain duties of Thompson, including tracking production numbers, completing paperwork on production efficiencies, and making changes to production process parameters.

When Vercolen and Thompson are not working, and problems arise, both are available to processing department employees via their cell phones. Their cell phone numbers are posted at the plant. If an employee does not show up for work and coverage is needed, Vercolen, not Thompson, is contacted first by the processing department employees. If there is an equipment problem, Thompson is contacted first. If neither Vercolen nor Thompson are available, processing department employees contact their co-workers, as the telephone numbers of all processing department employees are posted in the department.

## **2.) Administrative Duties**

### **a.) Scheduling Work and Monitoring Attendance**

With respect to scheduling, Thompson testified that Vercolen spends about 6 hours per day on the production floor and the remaining 2 hours off the floor performing various administrative duties including scheduling. Vercolen schedules processors, processing assistants, and temporary employees on a master schedule, in three-month intervals, for staffing the Employer's 24/7 operation in the processing department. Thompson testified that the needs of each shift are consistent as each of the three processors typically work one of the 8 hour shifts, Sunday through Thursday, and they are normally accompanied by at least one processing assistant on each shift. Thompson further testified that two processing assistants staff the Friday and Saturday shifts. However, this testimony does not square with the number of shifts and days in which the processing department is in operation. Simply put, there are too many shifts to cover and not enough processors or processing assistants to cover all the shifts in the manner indicated by Thompson's testimony. Indeed, the Employer's exhibit setting forth the October 2003 schedule supports this and appears to indicate that some shifts on Fridays and Saturdays are staffed only by temporaries while during Sunday through Thursday shifts, processors appear to occasionally only work with temporaries.

In any event, if the processors or processing assistants wish to make changes to the schedule, they must first seek approval from either Vercolen or Thompson. It is not clear what, if any discretion, Vercolen exercises with regard to the scheduling. Indeed, a review of the October 2003 schedule - the only one in the record - reveals a definite pattern to the scheduling of employees with notable exceptions for individuals that appear to be temporary employees. Additionally, Thompson did not testify whether she or the Plant Manager had any role in the scheduling process and/or in the review of Vercolen's work in this respect. Beyond the foregoing, there is nothing more to establish whether Vercolen exercises any discretion and/or independent judgment in the scheduling of employees.

While Thompson works Monday through Friday from, 6:30 a.m. to 4:30 p.m., Vercolen has no set shift. Rather, she works varied shifts that she selects, scheduling her shifts in one-month intervals. In choosing her shifts, Vercolen often bridges two different shifts, specifically to assist in the oversight of the department and for the purpose of insuring that the Employer

meets its production needs. Thompson approves Vercolen's schedule; however, Thompson did not define what her approval process entails.

With respect to scheduling overtime at the Facility, Thompson testified that Vercolen schedules and approves her own overtime and that of other processing department employees without having to obtain prior approval from Thompson or any other manager or supervisor. Thompson did not elaborate on what discretion, if any, Vercolen possesses in connection with granting overtime. For instance, if processing department employees are falling behind in production, does this situation automatically require Vercolen to grant or require overtime. Also, must Vercolen schedule overtime for employees when unexpected employee absences occur? In short, Thompson's testimony is lacking in this regard. However, the record reveals that Vercolen arranges shift coverage for coverage if an employee calls in sick.

Vercolen is also responsible for monitoring employees' attendance. In this regard, Vercolen reviews, on a weekly basis, the time cards punched by temporary employees and signs those cards before the Employer sends them to Express Personnel, the temporary agency. Also once a week, the Employer's human resources department provides Vercolen with a computerized record of attendance for the full-time processors and processing assistants. The record is sent to Vercolen, via e-mail to a computer she shares with Thompson.<sup>9</sup> For the seven full-time employees, Vercolen reviews the record for discrepancies, such as employees clocking in early or late, clocking out late, taking long lunches, and for absences. Vercolen compares the record to an attendance chart that she keeps on each employee.<sup>10</sup> If a comparison of the record against an employee chart reveals in excess of three late arrivals, or three absences within a 90-day period, Vercolen reports this to Thompson. In about the last 2 years, Vercolen reported excess absences to Thompson for either Seth Alcorn or Jason Day. Although the Employer's attendance policy provides that employees may receive written discipline if they exceed the three absences in 90 days standard, the record is unclear as to whether Alcorn and/or Day actually received written discipline for exceeding this attendance standard.

#### **b.) Evaluating Employee Performance**

On a yearly basis, Vercolen and Thompson evaluate processors and processing assistants in a number of different performance categories.<sup>11</sup> After Vercolen and Thompson independently evaluate the employees, they get together and discuss the ratings they assigned to each employee in each of the various categories. Vercolen and Thompson then combine the two independent ratings into one collaborative rating, and the independent evaluations are then destroyed. Both Vercolen and Thompson sign the joint evaluation and present it to the employee. Although they typically agree on the rating, Thompson testified, that if there is a major dispute regarding the rating to assign to an employee, she makes the ultimate decision

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<sup>9</sup> No other processing department employees have access to this computer. The computer is password protected. Vercolen accesses the computer data by logging onto the computer with her credentials and password.

<sup>10</sup> Thompson does not review the attendance records kept by Vercolen.

<sup>11</sup> Since the end of 2001, the Employer evaluated employees in the following categories: 1) attendance and tardiness; 2) conformance to GMP's (good manufacturing practices); 3) safety awareness; 4) quality of work; 5) productivity; 6) attitude toward managers; 7) attitude toward associates; 8) cooperation; 9) participation; and 10) overall performance. Employees were rated outstanding, very good, good, fair and poor in each category.

regarding the rating. However, Thompson did not testify whether she and Vercolen have ever had such a dispute.

The evaluations are generally utilized in connection with determining whether an employee is deserving of a merit wage increase. However, there has been a wage freeze in effect at the Facility since Vercolen was promoted to senior processor, which means that over the last 3 or 4 years, Vercolen's evaluation functions have had no impact on employees' wages.

**c. Recommending Employees for Hire, Transfer, Retention and Promotion**

Regarding the hire of employees, the record reveals that the Employer's employees are hired into full-time positions in the processing department in one of two ways: 1) temporary processing department employees are hired into full-time positions, or 2) employees transfer into the processing department from the Employer's packaging department. When full-time positions open, the opening is posted and both temporary employees and/or employees in the packaging department may apply.

Vercolen's duties include submitting recommendations to Thompson on hiring temporary employees into full-time positions. Thompson testified that she follows Vercolen's recommendations in this regard. For instance, Vercolen recommended to Thompson that temporary employee Mike Stewart be hired full-time as a processing assistant. Vercolen discussed the recommendation with Thompson, Thompson completed his new hire paperwork and ultimately recommended to Plant Manager Richardson that Stewart be hired full time. Stewart was hired full-time. Thompson did not testify as to whether she and/or Richardson conducted independent investigations in connection with Stewart's hiring. Moreover, Thompson did not testify to the impact of Vercolen's recommendation in instances where packaging department employees compete with temporaries for processing assistant positions.

With respect to transfers, the record reveals that packaging department employees, who wish to transfer into the processing department, apply for openings that are posted at the Facility. Based upon an employee's past performance in the plant, Vercolen and Thompson will jointly and equally decide whether or not to transfer an the employee in the processing department. Vercolen recommended to Thompson that packaging department employee Seth Alcorn be transferred into the processing department. Thompson testified that she knew very little about Alcorn's abilities. Consequently, she relied on Vercolen's recommendation that Alcorn possessed the skills necessary to work in the processing department. Although Thompson did not undertake an independent investigation into Alcorn's skills, she did ask the Packaging Manager about Alcorn's attendance. Based upon Vercolen's recommendation and the information she had obtained regarding Alcorn's attendance, Thompson recommended to Plant Manager Richardson that Alcorn be allowed to transfer into the processing department. Alcorn eventually transferred. However, Thompson did not testify regarding what occurs following her recommendation to Richardson; i.e., does Richardson conduct an independent investigation.

Regarding retention of temporary employees as full-time permanent employees in the processing department, Thompson relies on Vercolen's recommendation, which is based upon her evaluation of the employee's day-to-day performance. Thompson testified that the only time she would conduct an independent investigation as to the temporary employee's qualifications would be if there were a concern that Vercolen had a personal bias against the employee.

Thompson did not testify whether there have been instances of bias by Vercolen that would warrant Thompson's independent investigation.

Retention issues also arise in connection with the probationary period that Employer imposes on at the outset of employment. In this regard, Thompson testified that Vercolen had a role in recommending that employee Mike Gopher be retained as a processing assistant following the end of his probationary period. Gopher had previously converted from a temporary employee to a processing assistant and, then, commenced a probationary period at the commencement of his employment by the Employer as a processing assistant. Thompson further testified that Gopher had attendance problems during his probationary period. Despite his attendance problems, both Vercolen and Thompson felt that Gopher was a good worker. As a result, Vercolen and Thompson jointly and equally decided not to end Gopher's employment but, rather, decided to extend Gopher's probationary period. However, Gopher ultimately quit his employment. Thompson did not testify regarding what would have happened had she and Vercolen disagreed on retaining Gopher.

With respect to promotions, the record evidence reveals that processing assistants and processors may take a test to advance to a higher step within their job category and/or to be promoted from a processing assistant to a processor position. There are increases in pay associated with each step increase within a job category, as well as when employees are promoted from processing assistant to processor. With regard to the test, the Employer maintains a study guide containing 83 questions that Vercolen reviews with employees who express a desire to advance to a higher step within their job category and/or to be promoted to a processor position, if one becomes available. Based upon an employee's answers to questions posed by Vercolen, which answers may be in oral or written form, and based on Vercolen's evaluation of the employee's on-the-job performance, Vercolen recommends to Thompson whether the employee is prepared to take the test to advance. Thompson follows Vercolen's recommendation without conducting an independent investigation into the employee's preparedness.

Recently, employee Michael Stewart, who is currently a processing assistant, expressed a desire to take a test to move from step zero to step one within his job classification. Vercolen reviewed the study guide with Stewart. Following the review, Vercolen informed Thompson that Stewart was not ready for and would not pass the test, if taken. As a result of Vercolen's recommendation, Stewart was not allowed to take the promotional test.

#### **d.) Discipline**

The Employer has a progressive disciplinary policy, which begins with the issuance of an oral warning that is documented by a note in the employee's file. This is followed by two written warnings. Following the two written warnings, an employee may either be suspended or terminated depending on the severity of the infraction.

The record establishes that Vercolen has not specifically issued written disciplinary warnings to processing department employees nor has she issued documented oral warnings. However, Vercolen has had to counsel employees two to four times over the last two years about various issues such as exceeding the 30-minute lunch break and interpersonal problems among employees, none of those discussions led to the subsequent discipline of an employee.

One and one-half years prior to the hearing, a processing assistant reported to Vercolen that processor Jason Day was leaving the plant during his shift, while he was clocked in.

Vercolen reported this to Thompson and asked Thompson whether she could conduct surveillance during Day's shift. Thompson gave Vercolen permission to do so. While sitting in her vehicle in the Employer's parking lot, Vercolen observed Day leave the Facility during his shift. Vercolen reported her observations to Thompson via an e-mail message. After sending the e-mail, Vercolen initiated a meeting with Thompson. Vercolen and Thompson together reviewed the Employer's handbook and determined that Day's absence from the Facility while clocked in, was a violation of policy. Thompson initially testified that after discussing the issue with Vercolen, Thompson recommended to Plant Manager Richardson that Day be terminated. However, later in the record, Thompson indicated that she together with Richardson decided to suspend Day for 2 weeks. The record is unclear as to whether Vercolen recommended to Thompson that Day be suspended or terminated.

## **2.) ANALYSIS**

### **A.) Overview of the Law**

As noted above, the Employer contends that Vercolen is a supervisor as that term is defined by Section 2(11) of the Act while the Petitioner maintains that the Employer has not met its burden of establishing that Vercolen possesses supervisory authority.

The term "supervisor" is defined in Section 2(11) of the Act as follows:

[A]uthority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but rather requires a significant degree of independent judgment. *Stephens Produce Co., Inc.* 214 NLRB 131 (1974); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). "A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act." *Hicks Oil & Hickgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River Community Care, supra*. "The Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect." *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

The Supreme Court in *Kentucky River* emphasized that the degree, not the kind, of independent judgment is critical with respect to a finding of supervisory status. Put another way, the judgments made by an individual must be of a level of difficulty exceeding that which is merely routine or clerical in nature. However, the complexity of a given task is deemed equally complex, or not, regardless of the identity of the performer. A judgment that would be complex for, say, a high school graduate, does not become routine or clerical when performed by a Ph.D. Complexity is evaluated on an absolute scale (presumably based on an "ordinary"



person), not a scale that varies according to the training, schooling, or experience of the individual judgment maker. See *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989). Moreover, independent judgment occurs when a supervisor makes decisions independent of consultation with higher management. *Id.*

**B.) Authority to Assign and Responsibly Direct**

The Employer asserts that it has vested Vercolen with the authority to assign and to responsibly direct processing department employees. The Board has held that persons, who have authority to assign work, move employees from one task to another, and grant leave requests, have been held to be supervisors under the Act. *Louisiana Gas Service Co.*, 303 NLRB 908 (1991); *Massachusetts Coastal Seafoods, Inc.*, 293 NLRB 496 (1989). See also *Sunnyside Home Care Project*, 308 NLRB 346 (1992).

In the case at hand, Vercolen assigns employees to other production lines based upon her assessment of the product being produced and the number of employees needed to meet the production needs. Additionally, Vercolen decides whether to assign employees to repair broken equipment or to postpone the repairs because more pressing production needs must be met. Generally, Vercolen is also responsible for assigning employees to complete other needed repairs and to perform scheduled and unscheduled cleaning. With respect to unscheduled cleaning, Vercolen exercises discretion by balancing the needs for cleanliness with the pressing nature of production needs.

With respect to the authority to responsibly direct employees, the Court in *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4<sup>th</sup> Cir. 1981),<sup>12</sup> found five foremen to be statutory supervisors based on their responsible direction of other employees despite the fact that the daily operation was to some extent governed by written procedures and guidelines. In coming to this conclusion, the court defined responsibility as being “answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and is implied by power.” *Id.* at 613. In that case, the Court found that the alleged supervisors were responsible for coordinating the activities of employees, analyzed and resolved machinery problems, put employees to work when needed, and resolved difficulties if higher level supervisors were unavailable. The Court reasoned that if an employee “must coordinate the activities of several other employees to ensure the smooth operation of delicate machinery, [the employee] necessarily exercises a significant degree of independent judgment.” *Id.* at 614.

Here, the record evidence reveals that Vercolen responsibly directs employees in the processing department. In particular, she is charge with meeting production needs. In meeting those needs, Vercolen responsibly directs employees with regard to conducting timely repairs and effectively cleaning the Employer’s equipment in the processing department. The record further reveals that Vercolen exercises discretion in this regard in that she must balance repairs and the timing of necessary cleaning with pressing production needs. The timing of such repairs falls within the discretion of Vercolen who does not consult with Employer supervision or management in exercising her authority in this regard. Once Vercolen makes decisions of this nature, she further directs employees in the manner in which they perform the repairs and/or the cleaning to insure that the tasks are carried out in a timely and proper fashion.

The record also reveals secondary indicia of Vercolen’s supervisory authority; in particular, Vercolen counsels production employees regarding performance issues and closely

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<sup>12</sup> Cited with approval by the Board in *DST Industries*, 310 NLRB 957 (1993).

monitors employees' attendance. Vercolen trains the production employees and assesses their preparedness to take tests for promotional opportunities, which are normally tied to wage increases. When Vercolen is not physically working at the Facility, she makes herself available to her department employees via her cell phone and she often adjusts her work schedule and works overtime to allow her to be present during the transition of one shift to the other for the purpose of insuring a smooth transition.<sup>13</sup> The Employer has held Vercolen out as a supervisor by advising processing department employees that Vercolen is their supervisor. Although Vercolen's counseling, training, cell phone availability, personal work schedule changes, and the Employer's holding her out as a supervisor, do not amount to primary indicia of supervisory authority, they are secondary indicia, which support the conclusion that the Employer has vested Vercolen with the authority to assign and responsibly direct the day-to-day operations in the processing department.<sup>14</sup> See *B&B Insulation, Inc.* 272 NLRB 1215, 1219 (1984); *Chem Fab Corp.*, 258 NLRB 996, 998 (1981), *enfd.* 691 F.2<sup>nd</sup> 1292 (8<sup>th</sup> Cir. 1982).

Thus, the record evidence establishes that the Employer has vested Vercolen with the authority to assign and responsibly direct processing department employees.

**C.) Vercolen's Administrative Duties (Scheduling, Granting Overtime, and Monitoring Attendance)**

The Employer asserts that Vercolen is a supervisor because she schedules employees and monitors their attendance. However, Thompson did not detail what factors, if any, Vercolen must consider in making out employees' work schedules. Thompson also did not testify whether Vercolen's scheduling work is reviewed by Thompson, the Plant Manager or any other Employer official. The same detail was lacking with regard to granting overtime to cover scheduling problems or to meet production needs. Indeed, Thompson testified that Vercolen's personal schedule is approved by Thompson but there is no detail regarding what this approval process entails.

In terms of Vercolen's functions in monitoring attendance, although she reports to Thompson when employees exceed the permitted number of late arrivals and absences within the requisite 90 day time frame, the record is inconclusive as to whether Vercolen has ever recommended that employees be disciplined for exceeding the Facility standards. With respect to the incident involving employee Jason Day whom Vercolen caught leaving the Facility during his shift, the record is unclear as to whether Vercolen recommended to Thompson that Day be terminated or suspended for this misconduct. Ultimately, the Plant Manager decided to issue Day a two-week suspension. Thus, it appears that the Plant Manager is responsible for such decisions. However, Thompson did not elaborate on the nature or extent of Richardson's involvement in addressing attendance problems.

The burden of establishing supervisory status rests upon the party asserting its existence. *Kentucky River Community Care, supra*. In this case, I find that the record evidence

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<sup>13</sup> As noted above, the Employer did not provide details regarding the discretion or independent judgment utilized by Vercolen in making up the work schedule for the Processing Department. However, the fact that the scheduling falls in her area of responsibility is further indicia that she is charged with the overall day-to-day operation of the processing department.

<sup>14</sup> With respect to Vercolen's responsibility to assess whether employees are prepared to take tests, that will be more fully discussed below.

regarding Vercolen's scheduling, granting of overtime, and monitoring of attendance does not establish grounds for finding that Vercolen is a supervisor within the meaning of Section 2(11) of the Act.

**D. Effective Recommendation of Employees for Hire, Transfer, Retention and Promotion**

Individuals having the authority to effectively recommend any of the actions listed in Section 2(11) are supervisors. *Detroit College of Business*, 296 NLRB 318 (1989). Thus, where the evidence shows that the recommended action was taken without independent investigation by higher authorities, the recommending individual is a supervisor. *Elliott-Williams Co.*, 143 NLRB 811 (1963).

With respect to Vercolen's recommendations relating to the hire of a temporary employee into a processing assistant position, Thompson did not elaborate whether she and/or Richardson conducted an independent investigation of Vercolen's recommendation. Similarly, Thompson did not elaborate on what occurs following her recommendation to Richardson concerning transfers, as in the case of Alcorn. Additionally, I note that Thompson testified that she only relied on Vercolen's recommendation concerning Alcorn's skills and made another inquiry of the Packaging Manager about Alcorn's attendance. Presumably, had the Packaging Manager established that Alcorn's attendance was terrible, Thompson might have very well rejected Alcorn's transfer request. Under these circumstances, the Employer provided insufficient evidence to establish that Vercolen effectively recommends the hire or transfer of employees without independent investigation by her superiors.

However, the record establishes that Vercolen effectively recommends that temporary employees possess the skills necessary for retention, or effectively for hire, as processing assistants. Additionally, Vercolen effectively recommends that probationary assistant processors be retained following their initial probationary period. In this regard, Thompson testified that no independent investigation is conducted in connection with such recommendations by Vercolen. Vercolen's recommendations are tantamount to effectively recommending the hiring of temporaries and the permanent hiring of probationary processing assistants.

With respect to promotions, the record also establishes that Vercolen effectively recommends whether employees are prepared to take tests, if passed, impact their earnings. In particular, Vercolen determines employee readiness for promotional test-taking opportunities based both upon her observation of the employees work skills as well as employee responses to questions posed by her to the employees. Thompson always accepts Vercolen's recommendations as to employee readiness for promotional tests, without conducting an independent investigation. If Vercolen recommends that an employee should not take the test due to a lack of preparedness, the real impact is to deny a promotion opportunity to that employee. Thus, Vercolen's recommendations in this regard effectively grant or deny employees an opportunity for promotion and advancement in Employer's wage system.

In view of the above and the record as a whole, I find that Vercolen effectively makes recommendations with regard to the hire and promotion of employees.

#### **E.) Evaluation of Employees**

The Employer asserts that Vercolen is a supervisor due to her role in evaluating processing department employees. However, authority to evaluate is not among the statutory indicia of a supervisor. Thus, authority merely to evaluate employees, without more, is insufficient to establish supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Elmhurst Extended Care Facilities*, 329 NLRB No. 55 (1999). Still, when there is a direct correlation between evaluations performed and merit increases or bonuses awarded to employees, supervisory status is established. See *Bayou Manor Health Center*, 311 NLRB 955 (1993).

In *Harbor City Volunteer Ambulance Squad Inc.* 318 NLRB 764 ( 1995), the assistant supervisors, whose supervisory status was at issue in the case, and shift supervisors, admitted statutory supervisors, each prepared annual evaluations of employees in pencil. Afterwards, they met, discussed the evaluation, and came up with a final percentage rating for a particular employee. If there were any differences in opinion, the shift supervisor and assistant supervisor discussed the differences and then formulated the overall percentage rating together. The shift supervisor never unilaterally changed a rating nor did the shift supervisor retain ultimate authority in that area. In *Harbor City*, it was undisputed that the evaluations led to an automatic wage increase for the evaluated employees. Based upon these facts, the Board overruled the Regional Director and found that the assistant supervisors played at least an equal role, if not a primary role, in the evaluation process and accordingly found that they possessed and exercised statutory supervisory authority. *Id.* at 764.

In the instant case, Vercolen and Thompson each independently evaluate employees. Together, they then come up with a collaborative rating that they usually agree upon. However, in the event of a dispute, Thompson retains ultimate authority in rating an employee. Thus, unlike the facts in *Harbor City*, Thompson and Vercolen's roles in the evaluation process are not equal. Moreover, at the time of the hearing, there was a wage freeze in effect. Thompson testified that in the absence of the wage freeze, current pay rates allow for merit increases based on performance evaluations. However, subsequent testimony indicated that since Vercolen has been a senior processor, a wage freeze has been in effect. Thus for all practical purposes, Vercolen's input in this regard has had no impact on employees wages since 1999 when she assumed the senior processor position. Evaluations conducted by alleged supervisors have been deemed unpersuasive in establishing Section 2(11) supervisory indicia in the absence of evidence that an employee's job was ever affected by such an evaluation. *Mount Sinai Hospital*, 325 NLRB 1136 (1998); *Manor West, Inc.*, 311 NLRB 655, 663 (1993). Further, where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established at least with respect to those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). In the instant case, I find the evidence relating to Vercolen's input on employee evaluations insufficient to establish supervisory authority.

#### **F.) Discipline**

There is insufficient evidence to show that Vercolen disciplines employees or effectively recommends such discipline. The record evidence indicates that Vercolen has never issued oral or written discipline to any employees under her charge. While the record indicates that Vercolen often approaches employees in an effort to address interpersonal or attendance problems such as being late from break, the record is absent of any evidence establishing that

Vercolen either directly issued discipline and/or effectively recommended the same. Thus, I find the record does not establish that Vercolen possesses the authority to discipline employees or the authority to effectively recommend such action.

### **G.) Conclusion**

In view of the record evidence, the Parties' contentions at the hearing, and the Employer's brief, I find that Vercolen is a supervisor as that term is defined in Section 2(11) of the Act. In particular, I find that the Employer has vested Vercolen with the authority to assign and responsibly direct employees in their work and with the authority to effectively recommend hire of temporary employees, the retention of probationary employees, that employees be permitted to take tests for the purpose of advancement within the Employer's wage system. Accordingly, I shall exclude Vercolen from the unit and I shall direct an election<sup>15</sup> in the unit described as follows:

The following unit is appropriate:<sup>16</sup>

All full-time and regular part-time hourly employees, employed by the Employer at its Great Falls, Montana facility performing work in the packaging, processing, maintenance, sanitation, quality control, and warehouse departments, including the following classifications: processors, processing assistants, maintenance lead, maintenance "A" tech, boiler, sanitation, floating PMOs, line drivers, ticket writers, primary machine operator, packaging assistants, quality control tech, forklift operator, and lead warehouse; excluding packaging leads, senior processor, warehouse specialist, temporary employees, office employees, sales representatives, managers, salaried employees, officers, directors, partners, supervisors, and guards as defined by the Act.

There are approximately 34 employees in the Unit.

### **3. DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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<sup>15</sup> The following colloquy occurred at the close of the hearing between the Hearing Officer and the Petitioner: Hearing Officer: "...I would like to ask the union, if it is willing to proceed to an election in the alternate unit, if the unit sought is found to be inappropriate?" Mr. Chase: "No." Hearing Officer: "No, you are not?" Mr. Chase: "No. We believe this is an appropriate unit." While the Hearing Office appears to be addressing the issue of the inclusion/exclusion of Vercolen's senior processing classification in the unit, it reasonably appears that Petitioner misunderstood such and could reasonably assume that the Hearing Officer was addressing the overall appropriateness of the unit. As it appears that there could be some confusion in this regard, I have directed an election in this case. If Petitioner does not wish to proceed to an election due to the exclusion of Vercolen, Petitioner on or before October 14, 2003 may withdraw the petition, with prejudice.

<sup>16</sup> With the exception of Kay Vercolen, whom I am excluding from the unit, the unit description is in substantial accord with the stipulations reached by the Parties at the hearing.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Union, Local 8, AFL-CIO, CLC.

**A. List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, Suite 2948, 915 Second Avenue, Seattle, WA 98174 on or before October 14, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

**B. Notice of Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

**C.     Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by October 21, 2003.

**DATED** at Seattle, Washington, this 7<sup>th</sup> day of October 2003.

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Richard Ahearn, Regional Director  
National Labor Relations Board, Region 19  
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Seattle, Washington 98174

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